MENANG DEVELOPMENT (M) SDN. BHD.

v.

PEMBINAAN K & H SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[ORIGINATING SUMMONS NO. D5-25-25 OF 1991]
16 APRIL 1993

ARBITRATION: Application for appointment of arbitrator - Challenge to architects certificates - Whether challenge bona fide.

The plaintiffs were housing developers who appointed the defendants as contractors for their project. The plaintiffs challenged the architects certificates and applied for the appointment of an arbitrator.

Held:
[1] The challenge to the architects certificates was not *bona fide* but nevertheless the plaintiffs were not prevented from having the alleged defects and related claims arbitrated on.

[2] The plaintiffs have a right to apply for an arbitrator to be appointed in respect of the defects said to have been discovered by the new consultant engineers over and above the defects initially relied on in both the originating summons and the originating motion.

[Plaintiffs application for appointment of arbitrator dismissed with costs. Any fresh application for appointment of arbitrator directed to be filed before same Judge for disposal].

Legislation referred to:
Companies Act 1965, s. 218

For the plaintiff - T.J. Su; M/s. Cheah Teh & Su
For the defendants - Shahul Hamid Amiruddin; M/s. Hamid, Tung & Kumar

JUDGMENT

V.C. George J:
The plaintiffs on 5 March 1991 caused an originating summons to issue (O.S. 24-48-91) seeking an injunction restraining the 1st defendant from presenting a petition to wind up the plaintiffs pursuant to a s. 218 Companies Act notice that had been sent by the 1st defendant to the plaintiffs in respect of amounts that had been certified as being payable by the plaintiffs' architect in respect of building works done by the 1st defendant for the plaintiffs.

The instant originating summons was taken out by the plaintiffs against the defendants invoking the arbitration clause in the building agreement between the plaintiffs and the 1st defendant on the basis of what in effect amounts to a challenge of the architect's said certificate.

The 1st defendant had opposed both the originating summons and the originating motion on the ground that the challenge to the architect's certificates was not *bona fide.*

The originating summons and the originating motion were heard together on 6 April 1993. I delivered a written judgment in respect of the originating summons. The originating summons was dismissed with costs. *Inter alia* I had found that the certificates were not honoured on due dates or within a reasonable period of the due dates for any good reason. It was my judgment that the certificates were not honoured either because the plaintiffs were unreasonably not willing to settle their debts or were not capable of making the payments.

It would follow that the invocation of the arbitration clause was misconceived in that the challenge to the certificates was not *bona fide.* And it would follow that the originating motion should also be dismissed with costs.

Now, because of the non-payment of moneys certified as being due, the 1st defendant had terminated the agreement with the plaintiffs and had returned possession of the site to the plaintiffs. It was some six months after that (well after the plaintiffs' said originating summons had been caused to be issued) that the plaintiffs required a firm of consultant engineers (not the engineers used in the project) to report on the quality of the work of the 1st defendant. What these engineers had to say about the alleged defects on which the originating summons was based confirmed the defendants' contention that if what was relied on as defects were defects the retention fund was more than sufficient to rectify the alleged defects. However, these consultants have come out in their report with other alleged defects the cost of rectifying which would in their estimate be some RM800,000. This report was filed after submissions had commenced and no doubt

because of that has not been dealt with by the engineering advisers of the 1st defendant.

Now, while I was more than satisfied that the challenge to the architect's certificates made in the originating summons 24-48-91 was not *bona fide*, I am not prepared on such evidence as is before me to prevent the plaintiffs from having those alleged defects and related claims arising therefrom being sought to be arbitrated on. In my judgment what the plaintiffs have in effect is a counterclaim and I do not think that they should be allowed to set off what has already been certified as due in 1990 based on a counter-claim that they appear to have stumbled on in or about July 1991.

Accordingly, while I have to and do dismiss the application to have an arbitrator appointed on issues which I have found to be not *bona fide*, I do so without prejudice to the plaintiffs' right to apply for an arbitrator to be appointed in respect of the defects said to have been discovered by the new consultant engineers over and above the defects initially relied on in both the originating summons and the originating motion. I need hardly add that the defendants should also be entitled to challenge the latest report and to oppose the application if it is made.

I direct that any fresh application to appoint an arbitrator if filed should be filed in the Registry of the Court No. 3 of the Commercial Division at Kuala Lumpur so that it will come before me for disposal.

The costs of and incidental to this application will be paid by the plaintiffs.